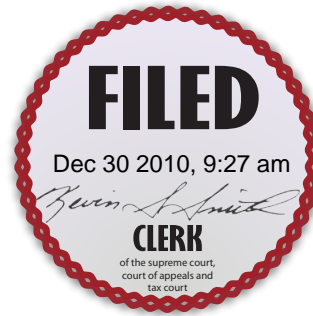


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DIONE J. OSUNA,)

Appellant-Defendant,)

vs.)

No. 45A03-1005-CR-252

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM IV
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0809-FC-122

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Dione J. Osuna (Osuna), appeals his conviction for possession of a handgun with an obliterated serial number, a Class C felony, Ind. Code §§ 35-47-2-18; -23.

We affirm.

ISSUE

Osuna raises one issue on appeal, which we restate as follows: Whether a failure to include an additional element of the offense in the jury instruction constitutes a fundamental error.

FACTS AND PROCEDURAL HISTORY

On September 2, 2008, Sergeant Keith Martin (Sergeant Martin) of the Griffith Police Department patrolled the streets in Griffith, Indiana. At approximately 4:00 a.m., he passed Osuna, who was driving in the opposite direction with his headlights off. Sergeant Martin flashed his lights at Osuna to remind him to turn his headlights on, but Osuna did not respond. Consequently, the Sergeant turned his car around and stopped Osuna for a traffic violation. Osuna had a friend sitting in the front passenger seat next to him. Sergeant Martin approached the driver's side of the vehicle and noticed that both occupants were acting nervous and Osuna's friend was making furtive movements.

About that time, Officer Peter Ghrist (Officer Ghrist) arrived on the scene. As Officer Ghrist approached the passenger side of the vehicle, Sergeant Martin ordered Osuna to exit the car. Osuna was asked to submit to several sobriety tests, which he passed. Meanwhile,

Officer Ghrist spoke to Osuna's friend and saw him take a baggie of pills out of his pocket. Osuna's friend was ordered out of the car and the baggie was seized. After running a check on Osuna's license, Sergeant Martin learned that there was an active Florida arrest warrant for Osuna. Both occupants of the car were arrested and the car was impounded. Prior to impounding the vehicle, the police conducted an inventory search of the vehicle which revealed a handgun under the passenger seat.

The gun was a Kel-Tec .32 caliber semiautomatic pistol. The gun had no serial number on the back strap in the spur area, where it typically should be; there were a number of scratch marks instead. Osuna admitted that he purchased the gun from an unknown individual near Lake Station, Indiana. There was no serial number when he bought it. Osuna also told the police that he always kept the gun under the passenger seat.

On September 3, 2008, the State filed an Information charging Osuna with possession of a handgun with an obliterated serial number, a Class C felony, I.C. §§ 35-47-2-18; -23. Following a two-day jury trial on February 1 and 2, 2010, Osuna was found guilty of the charged offense. On April 12, 2010, Osuna was sentenced to four years, with three of those years served in Lake County Community Corrections, followed by one year of probation.

Osuna now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Osuna argues that the trial court erred when instructing the jury. Specifically, Osuna contends the trial court committed a fundamental error when it failed to include an additional

element of the instant offense in the jury instruction, i.e. that Osuna knew the serial number of the gun had been altered.

The trial court has broad discretion in the manner of instructing the jury, and this court will review the trial court's decision thereon only for abuse of that discretion. *Snell v. State*, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007). When reviewing the jury instructions, we consider them as a whole and in reference to each other. *Id.* at 396. We will not reverse the ruling of the trial court unless the jury instructions, when taken as a whole, misstate the law or mislead the jury. *Id.* Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Id.*

Here, Osuna claims that the Final Instruction No. 2 should have included the knowledge element – that the State was required to show that Osuna knew the serial number of the gun had been altered – as required under Indiana law. *See Wagerman v. State*, 597 N.E.2d 13, 16 (Ind. Ct. App. 1992), *trans. denied*. The Final Instruction No. 2, as given by the trial court, read as follows:

Possession of a [h]andgun with an [o]bliterated [s]erial [n]umber is defined by statute in pertinent part as follows:

A person who possessed a handgun on which the manufacturer's serial number had been changed, altered, removed, or obliterated, commits of [sic] [p]ossession of a [h]andgun with an [o]bliterated [s]erial [n]umber, a [C]lass C felony.

To convict defendant of [p]ossession of a handgun with an obliterated [s]erial [n]umber, a [C]lass C felony, the State must have proved each of the following elements beyond a reasonable doubt.

1. The defendant
2. On or about September 2, 2008

3. Possessed a handgun on which the manufacturer's serial number had been changed[,] altered, removed[,] or obliterated.

(Appellant's App. p. 46).

Osuna did not object to the Final Instruction No. 2 at the trial. Because he did not object, any error predicated on the giving of the instruction was waived unless the giving of the instruction would rise to the level of fundamental error. *Faulisi v. State*, 602 N.E.2d 1032, 1038 (Ind. Ct. App. 1992), *trans. denied*. Fundamental error is an error so blatant and prejudicial that, if not corrected, it would deny the defendant due process. *Id.* Specifically, "it is fundamental error for the trial court to fail to give an instruction [to the jury] setting forth all the elements of the offense." *Nantz v. State*, 740 N.E.2d 1276, 1282 (Ind. Ct. App. 2001), *trans. denied*. Nevertheless, we have also held that there is no fundamental error when the missing element is an important consideration elsewhere in the jury charge or throughout the entire trial. *Faulisi*, 602 N.E.2d at 1038.

Here, we find that there was no fundamental error because the missing element was considered elsewhere throughout the entire trial. In particular, during the presentation of its case-in-chief, the State played a properly admitted taped interview of Osuna speaking to Detective Greg Mance (Detective Mance). They had the following conversation:

[Detective Mance]: What kind of handgun is that?

[Osuna]: Umm – it's a black grip classic type of semiautomatic.

[Detective Mance]: And where was that gun at? Where in your car was it?

[Osuna]: It was underneath the passenger seat.

...

[Detective Mance]: And that handgun, did it have a serial number on it?

[Osuna]: *Not when I got it, it didn't.*

[Detective Mance]: So you purchased that handgun?

[Osuna]: Yes.

[Detective Mance]: When did you purchase that handgun?

[Osuna]: About – what's this, September?

[Detective Mance]: It's September.

[Osuna]: (No response)

[Detective Mance]: Approximately when did you buy the gun?

[Osuna]: End of April.

(Transcript p. 134) (emphasis added). Further, when discussing the jury instructions and the jury's responsibility, the State argued:

The law says, and you will get jury instructions for this effect, that [Osuna] can't possess the gun if it has an obliterated serial number on it. Doesn't say [Osuna] has to obliterate it. It just says as long as the serial number is obliterated, or altered, removed, whatever, as long as that is the case and as long as [Osuna] had enough – *had the gun long enough to know that the serial number was gone*, then that is a crime to possess that kind of gun.

[Osuna] admitted that he possessed it. [Osuna] told the police that he possessed it. [Osuna] had it long enough to know that there was no serial number on it. *[Osuna] told the police that he did know there was no serial number on it.*

(Tr. p. 261) (emphasis added).

As such, we conclude that, when taken as a whole, the instructions given to the jury in this case did not misstate the law or mislead the jury. Osuna failed to affirmatively show that the erroneous instructions prejudiced his substantial rights because the State addressed the missing element in its final argument to the jury and Osuna himself admitted that there was no serial number on the gun when he bought it.

CONCLUSION

Based on the foregoing, we conclude that the trial court's failure to include the additional element in the Final Instruction No. 2 was not a fundamental error.

Affirmed.

ROBB, J., and BROWN, J., concur.